HIGH COURT OF CHHATTISGARH AT BILASPUR
M.C.C. No. 194/2006

APPLICANT Ramesh Kumar Jain

Versus

RESPONDENT M/s. Bharat Aluminium Company Ltd.

Order post for 16-4-2007

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR
M.C.C. No. 194/2006

APPLICANT		Ramesh Kumar Jain, aged about 50 years, son of Late Shri Hiralal Jain, R/o. Pulgaon Naka, Durg, carrying on business in the name & style of "R.K. Transport Company" as Sole Proprietor

Versus

RESPONDENT		M/s. Bharat Aluminium Company Ltd. A Company, through its President, Aluminium Bhawan, Korba, Distt. Korba (C.G.)

Present: Shri Anand Tiwari, Advocate for the applicant.
Shri Abhisek Sinha, Advocate for the non-applicant.

O R D E R

Per Dhirendra Mishra, J.

Heard.

The applicant has preferred this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short hereinafter referred to as "the Act") for appointment of arbitrator.

2. Case of the applicant is that the non-applicant is owner of the Bauxite mines whereas the applicant is a proprietor of the transport company. In the year 2002, parties entered into an agreement whereby the applicant had undertaken to mine 2 lakh tones of Bauxite in Menpat mines and transport the same to the non-applicant's plant at Korba vide Annexure A-1. The work commenced from 1st April, 2002 and extended period of the contract ended on 30-6-2005 and the contract between the parties stood determined with effect from 30th June, 2005.

3. Clause 33 of the agreement of Annexure A-1 provides for adjudication of the disputes through arbitration.

4. The applicant vide his communication dated 22nd August, 2005 of Annexure A-2 raised various claims arising out of the contract agreement before the non-applicant. He requested for appointment of Arbitrator as per Clause 33 of the agreement. In response to the above communication, the non-applicant vide their

reply dated 20th September, 2005 of Annexure A-3 rejected the claims of the applicant on the ground that there is no provision for such claim in the agreement and also refused to appoint arbitrator in terms of the provisions of the contract and the applicant was called upon for discussion and settlement. Since the contract agreement contains arbitration clause No. 33 for the purposes of adjudication of the dispute by the Arbitrator and as per the above clause, in the event of any dispute or difference of any nature whatsoever arising out of or in relation to this agreement was required to be referred to the Sole Arbitration of the Arbitrator nominated by President/Managing Director of the company and since the non-applicant has failed to appoint arbitrator even after the applicant raised the claim and requested for appointment of arbitrator, in the aforesaid circumstances, it is submitted that a case for appointment of arbitrator is made out.

5. It was further brought to the notice of this Court by the applicant vide their application dated 15-11-2006 that during the pendency of this petition, the applicant received a letter dated 12-9-2006 of Annexure A-4 whereby the non-applicant invoking the provisions of Clause 33 of the Contract agreement has appointed arbitrator subject to the consent of the arbitrator.

6. Non-applicant has not filed reply. However Shri Abhisek Sinha, Advocate appearing for the non-applicant has drawn attention of this Court that communication of Annexure A-2 dated 22nd August, 2005 nowhere mentions that the non-applicant was requested to appoint sole arbitrator under the provisions of the agreement for adjudication of the dispute raised by the applicant as alleged in the application. He further submits that from bare perusal of the application and documents annexed along with the application, it is manifestly clear that the applicant has not made any request to the non-applicant for appointment of Arbitrator and therefore, present application is premature and the same deserves to be dismissed.

7. In reply to the above contention, Shri Anand Tiwari, Advocate appearing for the applicant submitted that though in the communication of Annexure A-2, the applicant has not made any

specific request for appointment of Arbitrator and to refer the dispute to the arbitrator so appointed, nevertheless, the reply of Annexure A-3 of the non-applicant clearly reveals that some of the claims raised by the applicant have been rejected as they do not arise out of the terms and conditions of the mining and transportation agreement entered into between the parties and for the rest of the claims, the applicant has been requested to depute his authorized representative for discussion and settlement and only after discussion, if the dispute to such claim still subsists, the non-applicant may consider appointment of arbitrator in terms of Clause 33 of the Agreement. Looking to the conduct of the non-applicant in appointing the arbitrator during pendency of this application which is illegal as the non-applicant had forfeited his right to appoint arbitrator as the application was filed by the applicant before this Court, it would be expedient to appoint arbitrator as per Clause 33 of the agreement.

8. I have heard learned counsel for the parties. I have perused the arbitration agreement of Annexure A-1 as also document of Annexure A-2 and reply to the above document Annexure A-3.

9. Appointment of Arbitrator under the Act is governed by Section 11 of the Act. Relevant portion of Section 11 is reproduced:-

> "**11. Appointment of arbitrators.**- (1) A person of any nationality may be an arbitrator, unless otherwise agreed by parties.
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
>
> (4) If the appointment procedure in sub-section (3) applies and –

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, -

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

xxx xxx xxx
xxx xxx xxx
xxx xxx xxx"

10. From perusal of the above provision, it is manifestly clear that a party to an arbitration agreement before invoking Section 11 by approaching the Court for appointment of arbitrator, is required to make a request to the other side for appointment of arbitrator or to agree on the arbitrator and if the other party fails to appoint or agree on the arbitrator within 30 days from the receipt of the request, by one party from other party, appointment may be made by the Chief Justice or any person or institution designated by him upon request of a party.

11. In the instant case, the applicant has approached this Court under Section 11(6) of the Act without making a request to the non-applicant to appoint arbitrator as per Clause 33 of the agreement which is evident from reading of the document of Annexure A-2 dated 22nd August, 2005. Argument of the learned counsel for the applicant that since the claim of the applicant has been rejected vide reply of Annexure A-3 and further that the non-applicant has itself appointed arbitrator for adjudication of the dispute under Clause 33 of the agreement, is concerned, the above conduct of the non-applicant cannot dispense with legal requirement of making request by one party to the another party for appointment of arbitrator in terms of the contract agreement. Therefore, I am of the considered opinion that the present application is premature as the applicant has no cause of action for filing this application for appointment of arbitrator.

12. In the result, the application is dismissed. However there shall be no order as to costs.

Sd/-
Dhirendra Mishra
Judge